

PRESTON
GATES ELLIS
& ROUVELAS
MEEDS

ATTORNEYS AT LAW

Suite 500
1735 New York Avenue, NW
Washington, DC 20006-4759
(202) 628-1700
Fax: (202) 331-1024

STANLEY M. GORINSON
Direct Dial: (202) 662-8408

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 28, 1996

BY HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: **In the Matter of Implementation of Section 255 of the
Telecommunications Act of 1996 (WT Docket 96-198).**

Dear Mr. Caton:

Please find enclosed for filing the original and four (4) copies of the Comments of
Microsoft Corporation in the matter of Implementation of Section 255 of the
Telecommunications Act of 1996 (WT Docket 96-198).

Sincerely yours,

Stanley M. Gorinson /WFD

Stanley M. Gorinson

Enclosure

No. of Copies rec'd 053
List ABCDE

A PARTNER IN PRESTON GATES & ELLIS

ANCHORAGE, AK
(907) 276-1969
FAX: (907) 276-1365

COEUR d'ALENE, ID
(208) 667-1839
FAX: (208) 667-3567

HONG KONG
011 (852) 2511-5100
FAX: 011 (852) 2511-9515

LOS ANGELES, CA
(213) 624-2395
FAX: (213) 624-5924

PORTLAND, OR
(503) 228-3200
FAX: (503) 248-9085

SEATTLE, WA
(206) 623-7580
FAX: (206) 623-7022

SPOKANE, WA
(509) 624-2100
FAX: (509) 456-0146

TACOMA, WA
(206) 272-1500
FAX: (206) 272-291

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

RECEIVED

OCT 28 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

IN THE MATTER OF:

Implementation Of Section 255 Of The
Telecommunications Act Of 1996

WT Docket No. 96-198

Access To Telecommunications Services,
Telecommunications Equipment, And
Customer Premises Equipment By
Persons With Disabilities

COMMENTS OF MICROSOFT CORPORATION
IN RESPONSE TO THE COMMISSION'S
NOTICE OF INQUIRY

David A. Bolnick, Ph.D.
Accessibility and Disabilities Group
Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Accessibility Program Manager for
Microsoft Corporation

Jack Krumholtz
Law and Corporate Affairs
Department
Microsoft Corporation
Suite 600
5335 Wisconsin Avenue, N.W.
Washington, D.C. 20015

Stanley M. Gorinson
William H. Davenport
Preston Gates Ellis & Rouvelas Meeds
Suite 500
1735 New York Avenue, N.W.
Washington, D.C. 20006

Attorneys for Microsoft Corporation

October 28, 1996

TABLE OF CONTENTS

	<u>Page No.</u>
EXECUTIVE SUMMARY	iii
INTRODUCTION	1
BACKGROUND	2
A. Microsoft's Accessibility Initiatives	2
B. Legislative History Of The 1996 Act.....	5
DISCUSSION	7
I. STATUTORY REQUIREMENTS	7
A. Coverage	7
1. The Commission Should Define The Term "Provider Of Telecommunication Services"	7
2. "Telecommunications Equipment" Regulation Under Section 255 During Its Initial Production Should Be Limited.....	9
3. The Term "Customer Premises Equipment" Should Not Include Software	10
4. Manufacturers Subject To Section 255.....	11
a. The Commission Should Consider The Impact Of Differing Accessibility Standards, But Should Work With Other Countries To Make Its Standards Universal.	12
b. Hardware Manufacturers Should Be Responsible For Complying With Accessibility Standards.....	13
B. Requirements	14
1. The Commission Should Adopt A Narrow Definition Of "Disability" In The Context Of Telecommunications Services And Equipment.	14

2. The Commission Should Apply The ADA's "Readily Achievable" Standard Narrowly And Must Consider Costs.....	19
a. The Commission Should Rely On The Market To Develop Process-Oriented Standards Of What Is "Readily Achievable".....	20
b. The Commission Should Be Sensitive To The Cost Of Implementation And The Resources Of Affected Parties In Setting A Standard For What Is "Readily Achievable"	25
3. Definitions Of "Accessible To" And "Usable By"	27
a. The Commission Should Apply The Requirement That Products And Services Be "Accessible To" And "Usable By" Persons With Disabilities Only To Entities With Direct Control Over Such Access.	28
b. The Commission Should Allow Product Differentiation In The Development Of Accessible Products And Services.....	28
II. IMPLEMENTATION AND ENFORCEMENT.....	30
A. The Commission Should Promulgate Voluntary Guidelines Under Section 255 And Resolve Complaints On A Case-By-Case Basis.	30
B. Developing Equipment And CPE Guidelines In Conjunction With The Access Board	34
C. Complaints Under Section 255 Should Only Be Filed With The Commission Under Section 255	34
CONCLUSION.....	37

EXECUTIVE SUMMARY

MICROSOFT CORPORATION ("Microsoft") submits these comments in response to the Notice of Inquiry ("NOI") by the Federal Communications Commission (the "Commission") regarding implementation of Section 255 of the Telecommunications Act of 1996 ("the 1996 Act"). It is critical that people with disabilities have an equal opportunity to advance into the Information Age. By the same token, however, it is essential that the nation's telecommunications and related industries not be encumbered by government regulation undermining innovation and ultimately the development of new and more effective approaches to accessibility.

The marketplace should be the principal source of pressure to develop and implement accessibility technology -- this is the central message of the 1996 Act. And although Microsoft is not a telecommunications company, its experience demonstrates that accessibility technology can develop without government mandates. In the absence of any governmental pressure, Microsoft has created extensive accessibility tools for its products. Indeed, Microsoft has even offered its resources to *other* software developers in order to expand the number of products available to people with disabilities. The largely unregulated environment in which the computer software industry operates enables Microsoft and others to build upon these efforts continually, providing better and better tools for accessibility.

To set the stage for a telecommunications marketplace of innovative accessibility technologies, Microsoft urges the Commission to clarify several terms used in Section 255, including "provider of telecommunications services," "telecommunications

equipment,” and “customer premises equipment.” In each case, Section 255 either fails to define these terms or creates the potential for their unprecedented and unintended expansion. By explaining what is meant by these phrases, the Commission will reduce uncertainty for government regulators, telecommunications companies, and the public at large.

Microsoft therefore believes that the Commission should consider the effect of different international standards in accessibility technology, but that it should work to ensure that its standards become universal. Microsoft also suggests that the Commission consider hardware manufacturers as the most efficient point in the chain of production for implementation of accessibility technology.

Another portion of Section 255 that needs clarification is the part that borrows several terms from the Americans with Disabilities Act (ADA). Microsoft urges the Commission to clarify that, because of the unique nature of telecommunications, ADA terms like “disability,” “readily achievable,” and “accessible to and usable by” have a more limited scope under Section 255 than under the ADA. Similarly, Microsoft recommends that the Commission clarify that Section 255’s accessibility requirement does not mandate equal access to every telecommunications service and product for every disability.

Microsoft also recommends that the Commission avoid rigid standards and promulgate voluntary guidelines, as informed by its experience with the Accessible Technology Clearinghouse (ATC), a proposed national database of the latest innovations in expanding telecommunications access for people with disabilities. The Commission

could also use the ATC as a benchmark against which to evaluate complaints on a case-by-case basis.

And because of the constantly changing nature of the telecommunications industry, the Commission should place the burden of proof on complainants -- companies should not be required to establish that they could not have achieved more access for people with disabilities under some hypothetical set of facts. Additionally, the Commission should be the exclusive forum for complaints under Section 255 -- Congress and long-standing precedent have established that only the Commission is authorized to bring enforcement actions under this provision.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

IN THE MATTER OF:

**Implementation Of Section 255 Of The
Telecommunications Act Of 1996**

WT Docket No. 96-198

**Access To Telecommunications Services,
Telecommunications Equipment, And
Customer Premises Equipment By
Persons With Disabilities**

**COMMENTS OF MICROSOFT CORPORATION IN
RESPONSE TO THE COMMISSION'S NOTICE OF INQUIRY¹**

INTRODUCTION

MICROSOFT CORPORATION ("Microsoft") submits these comments in response to the Notice of Inquiry ("NOI") by the Federal Communications Commission (the "Commission") regarding implementation of Section 255 of the Telecommunications Act of 1996 ("the 1996 Act"). People with disabilities must have an equal opportunity to advance into the Information Age. By the same token, however, it is essential that the nation's telecommunications and related industries not be encumbered by government regulation undermining innovation.

Microsoft has voluntarily undertaken various steps to make its products more accessible and usable to as many persons as possible. Our commitment has been ongoing

¹ These comments are also being filed in diskette form.

and has led to the general availability of numerous Microsoft products to persons with various disabilities. The fact that these innovations have occurred without government intervention in the computer software industry serves as an excellent model for the approach the Commission should take with respect to the telecommunications industry under Section 255. While the software industry is not subject to Commission regulation, we believe that our experience should be of great assistance. Microsoft urges the Commission to move cautiously before creating compulsory rules and to impose a Government mandate only where it is clear that marketplace competition cannot satisfy the requirements of Section 255. Many of our proposals offered in response to the NOI's questions -- including specifically the Accessibility Technology Clearinghouse (*see* pp. 31-32, *infra*) -- are intended to use cooperation rather than confrontation as the principal vehicle for making telecommunications accessible to all.

BACKGROUND

A. Microsoft's Accessibility Initiatives

The Information Highway will increase everyone's freedom and independence and as a result, enhance the quality of life for all. But for many people with disabilities, the rapid development of new technology has brought unintended concerns or hardships. For example, some software vendors have had difficulty translating graphical user interfaces into formats accessible to people with disabilities. Similarly, persons with limited motor abilities may have difficulty using a keyboard or mouse.

To remedy these problems, Microsoft has been a strong advocate for usability and accessibility for people with disabilities. Since 1992, the company's Accessibility and

Disabilities Group has coordinated company-wide activity in this important area. The Group has been instrumental in the development of accessibility enhancements for Microsoft's Windows operating system and in providing assistance to independent software vendors ("ISVs") creating accessible utilities for Windows.

As described below and in the attached exhibits, Microsoft has taken a broad range of steps to ensure expanded product accessibility:

- **Corporate Policy Statement.** The following policy was officially adopted by Microsoft Corporation in July of 1995, and announced by Paul Maritz at Microsoft's Accessibility Summit 95: "As a leader in the software industry, Microsoft Corporation recognizes its responsibility to develop products and information technologies that are accessible and usable by all people, including those with disabilities. We will devote the time and resources necessary to ensure that all users enjoy access to our products, technologies and services. It is the responsibility of everyone at Microsoft to deliver on this commitment.

To realize this vision, Microsoft will address the needs of people with disabilities during all phases of product planning, development and support. This includes:

- Establishing accessibility guidelines for use internally and by third-party developers,
 - Working with the disability community to solicit and incorporate feedback when planning and developing products and services,
 - Supporting developers of disability access technologies,
 - Continuing to recruit qualified people with disabilities to contribute to product development efforts, services and corporate culture, and
 - Addressing known accessibility issues with products and services as they are updated."
- **Operating Systems.** Working with users with disabilities, organizations representing persons with disabilities, workers in the rehabilitation field, and ISVs and Independent Hardware Vendors ("IHVs"), Microsoft has developed numerous accessibility features for its operating systems. These features are offered in an Access Pack for the Windows 3.x, Windows NT Workstation, and MS-DOS operating systems. Furthermore, to ensure that these features are universal, they have been built directly into Windows 95 and Windows NT 4.0.

- **Recording for the blind and the dyslexic.** Microsoft has contracted with the nonprofit organization Recording for the Blind & Dyslexic ("RFB&D") to convert computer-related titles from software publishers, improve RFB&D's production technology and operations, and convert and distribute Microsoft product documentation and Microsoft Press books in accessible electronic text format at no charge to the consumer.
- **Beta and usability testing.** Microsoft used more than 100 sites to evaluate the accessibility of Windows 95 during the beta-testing process. Windows 95 was also the first Microsoft product to incorporate accessibility issues into its usability tests. This testing helps the company to better understand how users with disabilities interact with Windows and how Microsoft can make Windows and applications easier for them to use.
- **Information Access Partnership.** Microsoft has funded an alliance between the Trace Research and Development Center at the University of Wisconsin-Madison and the World Institute on Disability as part of its Information Access Partnership. This funding will promote research and private efforts to define voluntary accessibility guidelines for emerging technology and the entire technology industry.
- **National Information System.** Microsoft provides support for the National Information System, a nationwide toll-free-number service that provides single-source information on accessibility.
- **Support for Independent Developers.** Microsoft has developed its own guidelines for accessible software design (Attachment 1) and encourages software developers to incorporate accessibility features and increase compatibility with third-party accessibility aids. To assist developers with these goals, the company has offered use of its technology and Porting Lab, as well as access to its development staff. Microsoft also maintains an accessibility Web site (<http://www.microsoft.com/windows/enable/>) that contains information and products for both the lay and technical user.
- **Support for Microsoft Developers and Product Management.** Microsoft has dedicated staff that consults, develops, and promotes accessible design for our product groups. Microsoft also maintains an internal Web site that aids in the development of accessible software and hardware as well as providing external contacts and contractors with expertise in these areas. The company also has a program to include users with disabilities in its usability studies.
- **Marketplace Leadership.** Microsoft realizes its pivotal position in the software industry and its responsibility to lead the way in accessible software design. Thus, Microsoft has included a section on accessibility in its current Windows 95 and Windows NT logo program. (Attachment 2, at 50 *et seq.*) To display next year's 'Made for Windows 95/NT' logo, ISVs therefore will have to address various accessibility issues. Since this is the first Microsoft logo program to include these issues, Microsoft has positioned them as

recommendations for now, but with the caveat that they will become future logo requirements.

Microsoft's commitment to expanding accessibility is strong testimony to the power of the marketplace. The company embarked on these efforts in the absence of regulation, which gave it the freedom to develop innovative solutions to a variety of problems. Once its products were in the field, Microsoft was able to adapt them in response to feedback from users with disabilities and from advocacy groups. As demonstrated by Microsoft's corporate policy statement, the company seeks to incorporate accessibility throughout its design process.

Although software is not subject to FCC regulation, Microsoft believes that its actions should serve as an example to the Commission -- Government should encourage accessibility but avoid micro-managing its achievement. Through general, process-oriented guidelines that rely on private initiative rather than government mandates, the Commission will achieve the intent of Section 255 and the 1996 Act as a whole -- to promote universal access, competition *and* innovation.

B. Legislative History Of The 1996 Act.

Despite its potentially broad impact, Section 255 uses fairly imprecise language. Although both houses of Congress proposed and passed versions of Section 255 with little controversy, this uncharacteristic unanimity left an unfortunate absence of legislative explanation of the provision. Other than general statements lauding² Section

² A typical example is this excerpt from the remarks of Rep. Alcee Hastings (D-FL):

I am particularly pleased that H.R. 1555 [the House version of the 1996 Act] will break down barriers to telecommunications for people with disabilities by requiring that carriers and manufacturers of

255 and its purpose, the record contains little or no discussion of Section 255's meaning or implementation. But Congress's intent for Section 255 can be inferred from its comments on the 1996 Act as a whole -- expand accessibility through competition, not regulation. Microsoft urges the Commission to reflect this principle in its implementation of Section 255.

Throughout the legislative debate on the 1996 Act, Congress emphasized that it wanted the private sector, not the government, to be the catalyst for broader access to telecommunications services and equipment by business and consumers. One of the strongest examples of this principle is contained in the "Findings" section to Senate version of the 1996 Act. Throughout this section, the Senate repeatedly expressed its strong disapproval of any sort of government intervention in the telecommunications marketplace:

(1) Competition, not regulation, is the best way to spur innovation and the development of new services. A competitive market place is the most efficient way to lower prices and increase value for customers. . . .

* * *

(5) More competitive American telecommunications markets will promote United States technological advances, domestic job and investment opportunities, national competitiveness, sustained economic development, and improved quality of American life more effectively than regulation.

* * *

(7) Where competitive markets are demonstrably inadequate to safeguard important public policy goals, such as the continued universal availability of telecommunications services at reasonable and affordable prices, particularly in rural America, Congress should establish workable regulatory procedures to advance those goals, provided that in any

telecommunications equipment make their network services and equipment accessible to and usable by people with disabilities. The time is past for all persons to have access to telecommunications services.

141 Cong. Rec. H8269-02, H8276 (August 2, 1995).

proceeding undertaken to ensure universal availability, regulators shall seek to choose the most procompetitive and least burdensome alternative.

(8) Competitive telecommunications markets, safeguarded by Federal and State antitrust enforcement, and strong economic growth in the United States which such markets will foster are the most effective means of assuring that all segments of the American public command access to advanced telecommunications technologies.

* * *

(10) Congress should not cede its constitutional responsibility regarding interstate and foreign commerce in communications to the Judiciary through the establishment of procedures which will encourage or necessitate judicial interpretation or intervention into the communications marketplace.

-- 141 Cong. Rec. S8570-71 (daily ed. June 16, 1995).

Implementation of Section 255 should follow Congress' approach to telecommunications reform in this sensitive area of the law. Broad-ranging government regulation will force companies to exit the industry because they cannot comply in a cost-effective manner, undermine competition and innovation, and ultimately jeopardize access for persons with disabilities.

DISCUSSION

I. STATUTORY REQUIREMENTS³

A. Coverage

1. The Commission Should Define The Term "Provider Of Telecommunication Services"

Section 255's accessibility requirements apply to any "provider of telecommunications service."⁴ In the NOI, the Commission notes that the 1996 Act does

³ To facilitate the Commission's review, these comments adopt the format used by the Commission in its Notice of Inquiry.

not define this term. NOI, ¶ 8. Moreover, the phrase “provider of telecommunications service” is actually used as part of the definition of a “telecommunications carrier.”⁵ Thus, any definition of this term for purposes of implementing Section 255 could have a broad impact on the applicability of *other* sections of the 1996 Act.⁶ The Commission has requested comments on whether this phrase should be defined or clarified.

Any definition of “provider of telecommunications service” should not change the commonly understood definition of “telecommunications carriers.” As Microsoft has urged in other proceedings⁷, the Commission should take care not to disturb its long-standing precedent excluding enhanced or information service providers from the definition of “telecommunications carrier.” Such a definition will maintain regulatory consistency and avoid unnecessary confusion. Microsoft urges the Commission to consider the possible effects of this definition on the development of the Internet. As Commissioner Chong has stated, “the success of the Internet has been due to the fact that the Government has kept its mitts off of it. . . .”⁸

⁴ 47 U.S.C. § 255(c).

⁵ 47 U.S.C. § 153(44).

⁶ Nevertheless, without a definition, the Commission, the telecommunications industry, and the public will be uncertain as to whom Section 255 applies.

⁷ See, e.g., Opposition of Microsoft, *In the Matter of the Provision of Interstate and International Interexchange Telecommunication Service via the “INTERNET,”* Non-Tariffed Uncertified Entities, RM875, filed May 8, 1996.

⁸ Statement of Commissioner Chong, *Hearing on the Federal Communications Commission*, U.S. House of Representatives, Subcommittee on Telecommunications and Finance Committee and Commerce at 100 (March 27, 1996).

2. “Telecommunications Equipment” Regulation Under Section 255 During Its Initial Production Should Be Limited.

The 1996 Act defines “telecommunications equipment” as “equipment, other than [Consumer Premises Equipment], used by a carrier to provide telecommunications services, and includes software integral to such equipment.”⁹ Examples of such equipment include switches, satellites, microwave transmitters, and fiber-optic cables. As the Commission has acknowledged, however, consumers have limited direct interaction with such items. NOI, ¶10. The Commission has requested comment on the treatment of this equipment under Section 255. *Id.*

Given the infrequent contact between telecommunications equipment and *all* consumers, whether disabled or not, Microsoft suggests that the Commission only regulate telecommunications equipment under Section 255 that is likely to impact consumers directly. A limited rule, while necessarily imprecise, would avoid imposing costly and unnecessary accessibility restrictions on products where, for practical reasons, accessibility is not an issue.¹⁰

Moreover, it may be advisable to exempt every piece of telecommunications equipment from Section 255 regulation during its first year in the market. This type of limitation would reduce costs imposed by accessibility requirements while the equipment is still seeking market acceptance. Although some manufacturers might choose to

⁹ 47 U.S.C. § 153(45).

¹⁰ By suggesting a limited policy, Microsoft does not mean to suggest that persons with disabilities covered by Section 255 should somehow be denied access. Rather, we suggest that the Commission’s implementation of Section 255 deal with actual needs, rather than broad concerns that are less likely to have real benefits.

implement accessibility options immediately, this exemption would protect against additional costs in the early stages of a product's life. Such a policy would allow a manufacturer to test a product in the marketplace, then incorporate that experience into it prior to further adapting the product to accessibility standards.

3. The Term "Customer Premises Equipment" Should Not Include Software.

The Commission has requested comments on the scope of the term "customer premises equipment" ("CPE"), which the 1996 Act defines as "equipment employed on the premises of a person (other than a carrier), to originate, route, or terminate telecommunications."¹¹ NOI, ¶¶ 9-10. "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."¹² Theoretically, therefore, CPE could include virtually all consumer products used for the transmission of information.

But unlike the definition of "telecommunications equipment," that of CPE does *not* include "software integral to such equipment."¹³ Microsoft urges the Commission to consider the importance of this omission. By specifically referring to software in its definition of "telecommunications equipment," but omitting any such reference in its definition of CPE, Congress signaled its intent to exempt software from the scope of

¹¹ 47 U.S.C. § 153(14).

¹² Compare 47 U.S.C. § 153(43).

¹³ See *supra* at 9.

CPE.¹⁴ The Commission therefore should not subject software to Section 255's regulation.

Strong policy reasons underlie this legislative exemption. Any other reading could result in an effort to regulate operating system software, since computer terminals used for communications are considered CPE.¹⁵ The software industry is not now and should not be regulated by the FCC. Terminals have been required to meet FCC Part 68 standards¹⁶ and software vendors have accordingly conformed their products to meet those requirements in the most efficient way possible -- by working with the hardware manufacturers. This system permits maximum flexibility and innovation, conserves governmental and private-sector resources that might otherwise be deployed to deal with regulatory issues, and has worked well. There is no reason to tamper with it now, and the 1996 Act does not contemplate such tampering.

4. Manufacturers Subject To Section 255.

The Commission has requested comments on two aspects of responsibility for compliance with Section 255 among equipment manufacturers. NOI, ¶¶ 11-12. First, the Commission has asked how it should consider the effects of differing international accessibility standards in formulating and applying United States standards. *Id.*, ¶11.

¹⁴ It is a well-known principle of statutory construction that "where the meaning of a word is unclear in one part of a statute but clear in another part, the clear meaning can be imparted to the unclear usage on the assumption that it means the same thing throughout the statute." Norman J. Singer, 2A Sutherland Stat. Constr. § 47.16 at 185 (5th ed. 1991).

¹⁵ See, e.g., *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 208 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

¹⁶ See 47 CFR Part 68 (1995).

Second, the Commission has asked how responsibility should be apportioned among companies in the chain of production that contribute to the design, development, fabrication and manufacture of a particular piece of equipment. *Id.*, ¶12.

a. The Commission Should Consider The Impact Of Differing Accessibility Standards, But Should Work With Other Countries To Make Its Standards Universal.

The United States, with its preeminence in telecommunications, has a responsibility to take the lead in encouraging accessibility. Although European countries are considering measures similar to Section 255,¹⁷ the United States is much further along in developing and implementing accessibility technology. Consequently, the Commission *should* consider the impact of accessibility standards that differ from nation to nation.

Moreover, the Commission's questions reflect its recognition of the complexity (and perhaps turmoil) that might be caused by rigid standards. Different countries will approach the issue of accessibility in different ways. Some countries may even choose not to impose accessibility requirements for certain disabilities at all. So long as the U.S. marketplace is voluntarily meeting accessibility needs, neither U.S. nor foreign regulators should impose strict standards.

If the FCC were to impose such standards on American manufacturers but exempt foreign manufacturers, however, this would harm U.S. companies by making them less

¹⁷ See Wilhelm Egger, Deutsche Telekom AG and Chairman, European Telecommunications Standards Institute, Sub Technical Committee Human Factors, *Telecommunications Facilities for People With Special Needs* (available on the ETSI website, <http://www.etsi.fr>).

price-competitive. Therefore, the Commission should seek to ensure, through cooperation with other countries and international agencies, that accessibility regulations are as uniform as possible worldwide. In the absence of such a policy, U.S. and foreign technology companies could be faced with a patchwork-quilt system of international accessibility regulation, leading to higher costs and, as a result, fewer choices for persons with disabilities.

b. Hardware Manufacturers Should Be Responsible For Complying With Accessibility Standards.

The Commission has also requested comments on the allocation of responsibility for implementation of accessibility technology among the parties along the chain of production. NOI, ¶12. Microsoft recommends that this regulatory responsibility should be assigned to the manufacturer of the end product -- regardless of whether that manufacturer assigns the design, development and fabrication of components to others or licenses its design to others for production.

We recognize that "manufacturer" is a term of art that could have some fairly esoteric applications, but a fabricator is being paid only to build a specific product. That fabricator should not face liability for constructing the equipment as designed. Similarly, a designer asked to create a piece of equipment that might later be deemed "inaccessible" may have a dispute with the manufacturer but should not be regulated under Section 255.

The manufacturer is the entity who integrates the equipment, the entity under whose legal responsibility all these components -- design, development and fabrication -- are developed. The allocation of risk between these segments should be left to contractual negotiation, not regulatory fiat. Any other course is likely to lead to a

complex scheme of regulations that will be difficult for the private sector to obey and for the Government to enforce. Imposing Section 255's accessibility requirements at any other level could lead to a slippery slope situation, as each party in the chain of production uses the statute to pass responsibility to the next link.

B. Requirements

1. The Commission Should Adopt A Narrow Definition Of "Disability" In The Context Of Telecommunications Services And Equipment.

Section 255(a)(1) of the 1996 Act incorporates by reference the definitions of "disability" under the Americans with Disabilities Act (ADA).¹⁸ The ADA defines "disability" as:

- a) a physical or mental impairment that substantially limits one or more of the major life activities of such individual ("physical or mental impairment");
- b) a record of such an impairment ("record of impairment"); or
- c) being regarded as having such an impairment ("regarded as impaired").

-- 42 U.S.C. § 12102(a)(2).

The Commission has sought comment on the application of these definitions in the context of access to telecommunications services and equipment. NOI, ¶14. The Commission also has requested comments on possible differences in the application of this definition between the ADA and Section 255. *Id.*

As a first principle, the Commission should consider that Section 255 is *not* the ADA. The application of the ADA's requirements to telecommunication services and equipment must be tailored to these industries and must truly meet the needs of those

¹⁸ Pub. L. 101-336, 104 Stat. 327, 42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225 & 611.

with disabilities. Not every product or service can be made accessible to all users, with or without disabilities. But where readily achievable, a product or service should be accessible to as many persons as possible. The Commission therefore must apply “disability” cautiously in the telecommunications context.

The “physical or mental impairment” definition certainly applies in the telecommunications context. The Commission has pointed out that the legislative history of Section 255 suggests that this requirement is limited to “functional limitations of hearing, vision, movement, manipulation, speech, and interpretation of information.” NOI, ¶ 13. This list appears to be realistic, although the “interpretation of information” category appears somewhat amorphous and should be restricted to specific conditions for which solutions are readily achievable.¹⁹ Alternatively, if the Commission uses the broad term, it must clarify that not every disability can receive equal accessibility.

Since the ADA’s enactment, the Government has distinguished “disabilities” from other conditions that might have an “impairing” effect. The definition of disability incorporated in the ADA and now in the 1996 Act has been used for many years.²⁰ As explained by the Justice Department:

Physical or mental impairment does not include simple physical characteristics, such as blue eyes or black hair. Nor does it include environmental, cultural, economic, or other disadvantages, such as having

¹⁹ For example, it may be extremely difficult, if not impossible, to adopt a telecommunications product or service for someone who is mentally disabled or emotionally disturbed. The FCC should leave the creation of accessible products to niche companies who specialize in making such services or goods in response to public demand.

²⁰ According to the United States Department of Justice (DOJ), it was first used in the Rehabilitation Act of 1973, 29 USC § 790. *See, e.g.*, 28 CFR Pt. 36 Appendix 3 at n. 17 (1996).

a prison record, or being poor. Nor is age a disability. Similarly, the definition does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. However, a person who has these characteristics and also has a physical or mental impairment may be considered as having a disability for purposes of the Americans with Disabilities Act based on the impairment.

-- 28 CFR Pt. 36 App. B (1996).

While it is probably impossible to create a list of disabilities that is realistic, yet comprehensive, the list from the 1996 Act's legislative history should serve as a workable core list for the Commission.

The ADA's other definitions of disability have little to do with telecommunications. Section (b) (the "record of impairment" definition) applies in the ADA context when an individual "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."²¹ This category is intended to prevent discrimination against individuals who have either recovered from an impairment or who have been misclassified as having an impairment.²² In effect, this category states that disability is "in the eye of the beholder." It therefore logically applies only in a limited context, such as an employer's refusal to hire a person with a history of mental illness.

Similarly, the third category ("regarded as impaired") also depends on the perceptions of others. A person is said to have a disability under this category if he or she is treated *as if* they had an impairment that substantially limits one or more major life

²¹ 28 CFR §35.104 (1996); 28 CFR § 36.104 (1996); 29 CFR § 1630.2(k) (1996).

²² See 28 CFR Pt. 36, App. B (1996); 28 CFR Pt. 35, App. A (1996); 29 CFR Pt. 1360 (1996).

activities. Whether or not the person actually has such an impairment is irrelevant. Once again, this category would seem to apply only in a limited context, such as a restaurant's refusal to serve someone with severe burns on their face.²³ The second and third definitions therefore only apply where a third party misidentifies the person as "disabled" and discriminates against them on that basis. This characterization is identical to that of the Equal Opportunity Employment Commission:

The focus under the second and third parts [of the definition of disability] is on the reactions of other persons to a history of any impairment or to a perceived impairment. These parts of the definition reflect a recognition by Congress that stereotyped assumptions about what constitutes a disability and unfounded concerns about the limitations of individuals with disabilities form major discriminatory barriers, not only to those persons presently disabled, but also to those persons either previously disabled, misclassified as previously disabled, or mistakenly perceived to be disabled. To combat the effects of these prevalent misperceptions, the definition of an individual with a disability precludes discrimination against persons who are treated as if they have a substantially limiting impairment, even if in fact they have no such current incapacity.

-- EEOC Compliance Manual § 902.1 (1995)

Section 255's legislative history is silent on how these disability definitions are to be applied. Nevertheless, discriminatory treatment in the context of telecommunications services and equipment based on a *misperception* of disability would appear highly unlikely, if not impossible.

Microsoft therefore urges the Commission to utilize only the first definition of disability ("physical or mental impairment") in its implementation and enforcement of Section 255. This definition will provide developers of telecommunications equipment

²³ 28 CFR § 35.104 (1996); 28 CFR § 36.104 (1996); 29 CFR § 1630.2(l) (1996).

and services with a clear framework within which to address the diverse needs of disabled persons. By its suggestion, Microsoft does not seek to exclude potential disabilities; rather, we simply urge a narrow and logical definition of disability in the context of Section 255 that will prevent, or at least minimize, confusion.²⁴

The Commission has also requested comments regarding possible differences in the application of the term "disability" between the ADA and Section 255. Microsoft has already discussed the definitional differences. An additional distinction is the scope of each statute. The ADA prohibits discrimination against individuals with disabilities (as defined in the statute) in employment, the delivery of public services, and in public accommodations and services operated by private entities. Accordingly, the prohibition of discrimination uniformly reaches all disabilities for each entity.

Although such discrimination could conceivably occur in the telecommunications context, the 1996 Act is concerned with much narrower issues of access to telecommunications services and equipment. The application of the ADA's definition of disability should not require all products and services to address all disabilities at once. Because of the technical complexity of telecommunications technology, a universally accessible service or product would be impossible for anyone to create, let alone afford. There has been no showing -- certainly the legislative history seems quite sparse on the

²⁴ Even under the first definition of disability, the Equal Employment Opportunity Commission has been flooded with complaints from persons with back pain, emotional problems and ailments caused by alcoholism and other substance abuse. No more than six percent of complainants have impaired vision or hearing. Only about seven percent have disabilities related to their extremities. See Jay Mathews, *Disabilities Act Failing to Achieve Workplace Goals -- Landmark Law Rarely Helps Disabled People Seeking Jobs*, THE WASHINGTON POST, April 16, 1995, at A1.